DOCUMENT RESUME

ED 379 769 EA 026 514

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TITLE "Brown" at 40: The Tasks That Remain for Educators and Lawyers.
PUB DATE Nov 94
NOTE 9p.; Remarks prepared for the Annual Meeting of the National Organization on Legal Problems of Education (San Diego, CA, November 17-19, 1994).
PUB TYPE Speeches/Conference Papers (150) -- Viewpoints (Opinion/Position Papers, Essays, etc.) (120)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Ability Grouping; Bilingual Education; Court Litigation; *Educational Discrimination; *Educational Opportunities; Elementary Secondary Education; *Equal Education; Racial Bias; *Racial Discrimination; Racial Integration; *Racial Segregation
IDENTIFIERS Brown v Board of Education

ABSTRACT

This paper describes some of the race discrimination issues in education that are most pressing 40 years after the "Brown v. Board of Education" decision and offers ways in which lawyers and educators can help address such discrimination. The following race discrimination issues in education are likely to produce conflict: (1) the use of ability groupings that tend to segregate students of color; (2) educational remedies in school desegregation cases ("Milliken II"); (3) educational services for limited-English-proficient students and the feasibility of bilingual education; (4) educational services for children of undocumented immigrants and the role of school officials in enforcing national immigration laws; and (5) harassment based on race and national origin. Lawyers and educators should approach discrimination not only as a legal problem but as a problem warranting immediate and aggressive educational interventions. Attorneys can encourage their education clients to take the following steps: (1) acknowledge the problem; (2) promote student and staff diversity; (3) teach students the history of the American civil rights movement; (4) eliminate ability groupings and set high expectations for all students; (5) ensure that curricula respects the contributions and concerns of persons of color; (6) modify pedagogies; (7) treasure native languages and ethnic identities; (8) create professional staffs to serve an increasingly diverse student population; (9) eliminate funding inequities; and (10) reduce concentrations of poor children in urban schools. (LMI)

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BROWN AT 40: THE TASKS THAT REMAIN FOR EDUCATORS AND LAWYERS

Remarks Prepared for the General Session of NOLPE

Jay P. Heubert
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BROWN AT 40: THE TASKS THAT REMAIN FOR EDUCATORS AND LAWYERS

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Good afternoon. It's a pleasure to be here, and I'd like to thank Charles Russo and the NOLPE board for inviting me. It is also an honor to be sharing this platform with Cheryl Brown-Henderson and Patricia Brannan. Our topic for today is "the legacy of *Brown*." I plan to focus on the tasks that remain for educators and lawyers.

On May 10, 1994, something extraordinary happened: Nelson Mandela was inaugurated President of South Africa. It was an event few of us thought we would live to see.

Just seven days later, we in the United States also commemorated the end of state-imposed racial segregation. For it was just over 40 years ago -- on May 17, 1954, in the *Brown* decision -- that our own Supreme Court first declared apartheid illegal in *this* country. That formal apartheid -- approved by all levels of government -- existed here so recently is a sobering and humbling thought.

The past forty years have seen significant progress in addressing issues of racial discrimination in education. To cite only two pieces of evidence -- the kind of outcome-based evidence much in favor today -- high-school graduation rates and college-going rates for African-Americans are vastly higher today than in 1954. In fact, after 15 years in which virtually every state has adopted tougher standards for high-school graduation, higher numbers and proportions of black students are graduating from high school than ever before. This is very good news, worth celebrating much more than we have.

At the same time, in the U.S. as in South Africa, full equality of opportunity based on race and national origin still remains more an ideal than a reality. Governor Lowell Weicker, who attended President Mandela's inauguration, put it this way: "[T]here was not one of us witnessing history in Pretoria, as representatives of the United States, who didn't comprehend that what was ending in South Africa as a matter of law was thriving in our own country as a matter of practice. The long moral finger of outrage that we for so long had pointed at South Africa was now more properly directed at ourselves."

The inequalities in American society are hardly limited to education, of course. Discrimination has long existed, and continues, in housing, employment, health care, transportation, access to credit, the criminal justice system, public safety, and other public and private domains outside education. Many of our urban centers and the people who live there are in crisis. As educators and as attorneys working with educators, it falls to us to educate our society to the fact that schools cannot solve these problems on their own.

And yet, whenever anyone proposes measures to address inequality in American society, many of the recommendations are addressed to schools, educators and the lawyers who work with educators. That being the case, it's appropriate to ask just what forms racial discrimination takes in our schools these days and what we, as lawyers and educators, can do to address such discrimination. I will begin by describing some of the race discrimination issues in education that seem most pressing forty years after *Brown*. I will then offer thoughts on ways in which lawyers and educators can help address such discrimination.

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I see the following as race discrimination issues in education that are likely to produce conflict, in and out of court, unless we take steps to address them:

- First, debates over so-called "ability grouping" and other classifications that tend to segregate students of color in undesirable and inappropriate educational settings. The educational harms and segregative effect of homogeneous grouping are well documented; as my colleague Gary Orfield has put it, the benefits of desegregation are not known to penetrate concrete walls. Nonetheless, attitudes such as those expressed in *The Bell Curve* reinforce the view that the proper place for certain racial and ethnic groups is at the bottom.

- Second, conflicts over *Milliken II* relief: educational remedies in school desegregation cases. It couldn't be more obvious that we have hardly begun to address the continuing educational effects of state-imposed racial segregation. This term, however, the Supreme Court, in the Kansas City case, may well put limits on the duty of state and local officials to address the *educational* vestiges of illegal segregation. Educators and lawyers who support such funding, myself included, are hampered by the shortage of clear evidence that such remedies have produced improved student achievement.

- Third, as numbers of limited-English-proficient students rise, we can expect more debate over educational services for such children. These conflicts will be fueled not only by "English-only" types, but also by teacher unions and by some "language-minority" groups who question the value of bilingual education. As the have in Denver and San Francisco, we can also expect conflicts to surface in school desegregation cases, between parents who favor maximum desegregation and those who wish to concentrate speakers of languages other than English in order to provide them bilingual education.

- Especially after Proposition 187 in California -- which probably won't remain confined to California any more than Proposition 13 did -- we can expect protracted litigation over educational services for the children of undocumented immigrants and over whether school officials may be impressed into service as enforcers of the national immigration laws, a role many educators would find abhorrent.

- We can also expect a significant expansion in litigation over harassment based on race and national origin. Such harassment has long been a serious problem in many parts of the U.S., of course, but there are now strong new financial incentives for employees and students to sue school districts for harassment based on race or national origin. The Civil Rights Act of 1991, which amended federal employment-discrimination law; *Franklin v. Gwinnett County School District*, which expanded damage remedies under Title IX; and recent OCR policies concerning district liability for student-to-student harassment, all apply with equal force to harassment based on race and national origin under Titles VI and VII.

How can we, as lawyers and educators, address such issues of discrimination? We can, of course, rely on our traditional roles and assumptions. Educators, at least those fortunate enough to have regular access to attorneys, can call their lawyers when they've been sued or have reason to fear litigation. Similarly, attorneys, in their traditional roles as litigators and legal advisers, can continue both to challenge discriminatory educational practices through litigation and to advise education clients on how best to respond to lawsuits, actual and threatened.

For several reasons, however, I believe that these traditional roles and expectations are too restrictive, in part because they are largely reactive rather than preventive. Obviously it is in everyone's interest -- those who suffer from discrimination and those who get punished for condoning or engaging in discrimination -- to avoid discrimination in the first place. Right now, however, in education and most other domains, "preventive law" is little more than a mantra we all repeat. If we are serious about reducing discrimination, I think we should approach it not just as a legal problem for the lawyers but as problem warranting immediate and aggressive educational interventions. Some of these interventions, incidentally, do not require significant additional funding. Here are some of the specific steps I, as an attorney, would encourage my education clients to take to reduce racial discrimination in schools and race discrimination litigation:

I would begin by *acknowledging* the problem: the painful fact that prejudice and discrimination still run deep in American society -- as they do in Bosnia, Rwanda and most other countries. How many board attorneys, school board members, superintendents, principals and teachers call attention to this painful fact with any regularity? On television, often an indicator of what is worst in American culture, even the extraordinary program *I'll Fly Away* deals with issues of racial discrimination only from a safe distance, 30-odd years ago. In the U.S., moreover, we must acknowledge that we are no longer concerned solely with biracial, black-white conflicts; tensions between Blacks, Hispanics and Asians are of equal or even greater concern in many communities.

I would also advise my clients to promote student and staff discussion of racial and ethnic conflicts. At present, there are far too few opportunities, in school or out, for such conversations. Franz Kafka pointed out that "we each have a wound; all we can hope for is that the wound remains clean." Unfortunately, however, over much of the last 15 years the entire national discourse over issues of race has become badly infected by leaders who have appealed to the worst in us and insisted that racism was a thing of the past.

What better place to disinfect and discuss such conflicts than in schools? We can make a point of creating opportunities for potential antagonists to get together and talk through together the issues that divide them. These include conflicts between whites and persons of color. They also include disputes between blacks, Latinos and Asians. Face to face conversation is the best way I know to promote understanding and mutual respect, and this is something schools are uniquely equipped to provide.

Third, as we discuss with our students the ongoing struggles for human rights around the world, we can also make sure that our students know the history of America's own struggle for human rights.

Many of us old enough to remember the civil rights movement tend to assume that all that is common knowledge. It isn't. Students in our schools and colleges and many of our younger teachers weren't even alive when police unleashed dogs and fire hoses on marchers seeking only the right to vote, or when whites in Boston, abetted by city officials at the highest levels, stoned school buses filled with black children. Too many of our history and social studies classes cover this period superficially if at all. We also largely ignore well-documented historical discrimination against Hispanics, Asians and Native Americans.

Moreover, it isn't just whites, or men, who are unaware of important events of the recent past. There are also many young women and persons of color today who do not

realize that vast portions of the labor market now open to them were closed only a decade ago. No battle is ever won once and for all, least of all the fight against discrimination. The history must be studied, and the issues discussed, by each new generation.

I would also counsel my clients to adopt educational practices that promote racial interaction and equal opportunity. We should start, I believe, by working to eliminate so-called "ability grouping," which is simply unjustifiable, educationally and in many other ways. More generally, we can encourage our education colleagues to provide every child with a "high-octane" curriculum, since that is what the research tells us makes for optimal learning for *all* students, even those who are less able or less motivated academically.

Knowing the research on teacher expectations, we can insist on finding and teaching to the best in each student, rather than setting low expectations and seeing them fulfilled. Another phrase that we all repeat like a mantra is that "every child can learn," but there are too many educators who don't really believe it, and who would rather see themselves as martyrs in a hopeless cause than change their own practices and attitudes so that every child could learn. We must challenge such attitudes; let educators who hold them find some other profession.

We can also examine our curriculum to be sure it reflects and respects the contributions and concerns of persons of color. This issue is usually framed in terms of a choice between a Eurocentric curriculum and something more multicultural. The dichotomy is a false one, I believe, for when we examine the curriculum we call "Eurocentric" it is quickly apparent that much of what we commonly attribute to western culture -- including, for example, the free enterprise system, theories of federalism, and important mathematical concepts -- actually emerged from interactions with non-European societies, in these cases, the Arabs and Chinese, the Iroquois, and the Mayans, respectively.

We can also modify our pedagogies. There is now solid research on strategies teachers can use to ensure that students of all races participate actively in class discussions. Such strategies obviously promote educational equality, but how many school districts know about them or actually insist that teachers use them?

Next, recognizing that all children in this country need to be able to speak and write in English, we can decide to regard native languages other than English as a national treasure and a legitimate source of ethnic identity and pride rather than as something anti-American that should be stamped out.

We can also expand efforts to create professional staffs that better reflect and serve our increasingly diverse student populations. I think we should make full use of affirmative action strategies in hiring and promotion. I also believe we should modify our job descriptions to say that we want *all* our teachers and administrators to be knowledgeable about and committed to the educational, personal and professional development of students of color. Such a criterion, now used by the school where I teach, is perfectly legal and creates incentives for *all* school staff to focus on the needs of our minority students.

We also need to eliminate gross funding discrepancies between rich and poor school districts, and to ensure that every district has the resources it needs to provide children with an adequate education. Obviously it matters not only how much we spend but what we actually spend money on -- and we in education can be faulted for not having reached greater consensus on where education dollars can best be spent. At the same time it is

lunacy for a child's educational chances to depend so heavily on where his or her parents happen to reside. It is also gross hypocrisy that the districts that spend the most on education are always the ones arguing that money doesn't make a difference. If they really believed that, of course, they'd give the money away rather than fighting desperately to keep it. What they are really saying, I think, is that it's a waste to spend money on the kinds of children who typically live in poorer districts. We know better, and should not let such assumptions go unchallenged.

Over the longer term, we also need to reduce the high concentrations of poor children in our urban schools. That, however, will require lowering the barriers between cities and surrounding suburbs, not just in education but also in housing, employment and transportation. We can expect many suburbanites to resist such changes, all the more reason why educators and their lawyers should make clear to parents and policy makers what is at stake educationally.

This brings me to two points that are more important than all the rest.

One is that we can't watch in silence when we see acts of intolerance around us. Former Circuit Judge Leon Higgenbotham recently quoted the Reverend Martin Luther King on this point. Here is what Dr. King said in 1965:

> Was not Albert Einstein right when he said: 'The world is in greater peril from those who tolerate evil than from those who actually commit it?' Will the nation ever forget the searing impact of Rabbi Joachim Prinz's admonition as he spoke at the March on Washington in 1963: 'When I was the rabbi of the Jewish community in Berlin under the Hitler regime, I learned many things. The most important thing I learned in my life and under the tragic circumstances is that bigotry and hatred are not the most urgent problems. The most urgent, the most disgraceful, the most shameful and the most tragic problem is silence.'

This warning is an apt one for educators and the lawyers who work with them, since we all see so much in schools that we recognize as the product of bigoted and stereotypical thinking. I believe it is our duty to challenge such thinking whenever we see it.

Second, even as we challenge injustice, we must be generous with one another, because racism, like sexism, is all around us, like the air we breathe, and we have all internalized it in different ways.

A few months ago, my wife brought this point home powerfully to me. We were watching a James Bond movie on TV -- and this was Sean Connery, the real James Bond, not one of those imitations. At one point Bond grabs a nurse and tries to kiss her. She backs off in shock and distress, and says "Mr. Bond!" Bond responds by threatening to tell her boss about some mistake she'd made earlier -- unless, of course, she's prepared to cooperate. Soon you see them embracing behind a steamy shower door.

At that point, my wife turned to me and said, "My God! This is where Bob Packwood got the idea!"

James Bond is no mere man, of course. Actually, he's not a man at all, but rather a cultural icon. And many of us grew up thinking that this is how a real man is supposed to behave. Immediately our problems with sexual harassment become easier to understand.

Part of Nelson Mandela's great genius has been his refusal to yield to anger. He remains friendly with the white man who was his jailer for decades, and had the grace to describe F. W. de Klerk as "one of the greatest sons of South African soil." Had Mandela somehow forgotten the horrors of apartheid? Hardly. Through all his tribulations and with all his justifiable anger, Mandela has retained his respect for the humanity of even his oppressors.

Mandela is recognizing what most teachers also know: that while all human beings have deep biases and flaws, they also have the capacity and often the desire to grow. Listen to some of what President Mandela said four weeks ago:

> Out of the experience of an extraordinary human disaster that lasted too long must be born a society of which all humanity will be proud....Our daily deeds as South Africans must produce an actual South African reality that will reinforce humanity's belief in justice, strengthen its confidence in the nobility of the human soul and sustain all our hopes for a glorious life for all....The moment to bridge the chasms that divide us has come. The time to build is upon us. We have, at last, achieved our political emancipation. We pledge ourselves to liberate all our people from the continuing bondage of poverty, deprivation, suffering, gender and other discrimination....We know that none of us acting alone can achieve success....Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another...

Can we find within ourselves both Mandela's determination to end discrimination and his largeness of spirit? Can we make Mandela's aspirations our own? I certainly hope so.

I'm almost finished. I'm reminded of a cartoon I once saw. It shows a couple in bed late at night. One turns to the other and says, "It's late, dear, and I'm tired. Would you mind beginning your final summation?" Here is my final summation.

I recognize, of course, that I what I am suggesting here is an untraditional role for lawyers. Let me say it explicitly: I believe that it is emphatically the role of attorneys to work with educators to prevent discrimination and the litigation it produces. It is part of the attorney's job, working with educators, to devise strategies for changing the attitudes that lead to discrimination.

Though educators and lawyers can't do it alone, working collaboratively they do have enormous power to make differences in the lives of young people, to create institutions and human communities that address more effectively and fairly the needs of those around us, especially those who are neediest and least powerful.

Unfortunately, addressing continuing discrimination and equalizing educational opportunity are not what our society rewards most highly. The most recent political trends confirm this. But corruption is not compulsory, and I am certain that the political obstacles are no greater than those that faced Thurgood Marshall and his compatriots between 1930 and 1965.

To succeed, I think, will require that educators and lawyers learn more about the other's domains. It will require lawyers to educate their clients about the law. Most

important, it will require educators and lawyers to work together more closely than before to address issues of discrimination that are neither strictly legal questions nor strictly educational ones.

Equally important is to have the tenacity and courage to see things through. Who would have believed that apartheid would come to an end in South Africa without full-scale civil war? Something extraordinary was at work there: Nelson Mandela's long struggle, like Thurgood Marshall's, shows that when we do show courage, we're often able to achieve things that hadn't seemed possible.

As Anais Nin explains this remarkable phenomenon, "life expands or contracts in proportion to one's courage." In *Catch 22*, Joseph Heller expresses a similar thought: "One good apple can spoil the rest."

I know that this group contains many good apples. I wish you the best in your efforts to fulfill the promise of *Brown*. Thank you.